

No. 17-8527

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN VEGA-ORTIZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals correctly affirmed the district court's rejection of petitioner's collateral challenge to the removal order underlying his prosecution for illegal reentry under 8 U.S.C. 1326.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 822 F.3d 1031. The order of the district court is unreported. A prior order of the district court denying petitioner's motion to dismiss the information is reported at 994 F. Supp. 2d 1091.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 2016. A petition for rehearing was denied on January 29, 2018 (Pet. App. 13a). The petition for a writ of certiorari was filed

on April 11, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of illegal reentry after removal, in violation of 8 U.S.C. 1326(a) and (b). Pet. App. 3a; Presentence Investigation Report (PSR) ¶¶ 1-2. The district court sentenced petitioner to 30 months of imprisonment, to be followed by two years of supervised release. C.A. E.R. 2-3. The court of appeals affirmed. Pet. App. 1a-12a.

1. In 2010, petitioner, a native and citizen of Mexico, was convicted in California state court of possession for sale of methamphetamine, in violation of Cal. Health & Safety Code § 11378 (Deering 2010), and possession for sale or transportation of methamphetamine, in violation of Cal. Health & Safety Code § 11379 (Deering 2010). Pet. App. 4a; C.A. E.R. 191, 196.

In June 2011, the government initiated removal proceedings against petitioner. Pet. App. 4a; C.A. E.R. 191, 196-197. The government charged petitioner as removable on three grounds: (1) he entered the United States without permission and was unlawfully present in the country under 8 U.S.C. 1227(a)(1)(A) and (B); (2) he had been convicted of a controlled-substance offense under 8 U.S.C. 1227(a)(2)(B)(i); and (3) he had been convicted of

an aggravated felony under 8 U.S.C. 1227(a) (2) (A) (iii). Pet. App. 4a; C.A. E.R. 196. The latter two grounds were based on petitioner's 2010 drug convictions. Ibid.; see 8 U.S.C. 1101(a) (43) (B); 18 U.S.C. 924(c) (2).

The term "aggravated felony" includes, as relevant here, a "drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a) (43) (B). Section 924(c), in turn, defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." 18 U.S.C. 924(c) (2).

Since 1970, the federal government has regulated controlled substances through the Controlled Substances Act (CSA), 21 U.S.C. 801 et seq. That statute establishes five schedules of controlled substances and precursors the possession or distribution of which are generally prohibited. See 21 U.S.C. 811, 812 (2012 & Supp. V 2017); 21 U.S.C. 841(a), 844(a). And it authorizes the Attorney General to add or remove drugs based on specified criteria. See 21 U.S.C. 811(a) and (c), 812(a) and (b). The Attorney General has regularly added drugs to those schedules based on those criteria, and has removed drugs as well. The most recently published schedules of federally controlled substances appear at 21 C.F.R. 1308.11-1308.15.

Most States, including California, have enacted statutory frameworks to regulate controlled substances that are designed to

parallel the federal regime. Contemporaneously with the drafting and consideration of the CSA, state and federal authorities worked together to create a model state law that would "complement the comprehensive drug legislation being proposed to Congress at the national level." Richard Nixon, Special Message to the Congress on Control of Narcotics and Dangerous Drugs, 266 Pub. Papers 513, 514 (July 14, 1969) (Presidential Message). That model law -- the Uniform Controlled Substances Act (amended 1994) (UCSA), 9 U.L.A. 853, 854 (2007) -- seeks, by mirroring the CSA, to create "an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem." USCA Prefatory Note, 9 U.L.A. 854; see Presidential Message 514 (also describing federal and state law as an "interlocking trellis"). The UCSA created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for States to add or remove drugs based on the same criteria employed by the Attorney General under the CSA. UCSA § 201 & cmt., 9 U.L.A. 866-870.

After a hearing, an immigration judge (IJ) sustained the government's charges against petitioner on all three grounds and ordered petitioner removed. Pet. App. 4a; C.A. E.R. 196. Petitioner was removed from the United States in August 2011. Pet. App. 4a; C.A. E.R. 199.

In December 2011, petitioner reentered the United States without permission. C.A. E.R. 199-203. Petitioner was apprehended, and the Department of Homeland Security reinstated the 2010 removal order and again removed him to Mexico. Ibid.

2. a. In April 2013, a United States Customs and Border Patrol agent found petitioner hiding under some rocks on the United States' side of the international border with Mexico. Pet. App. 4a. Petitioner acknowledged to the agent that he was a native and citizen of Mexico and that he was unlawfully present in the United States. Ibid. The following month, petitioner was charged by information in the United States District Court for the Southern District of California with one count of illegal reentry after removal, in violation of 8 U.S.C. 1326(a) and (b). Pet. App. 4a; C.A. E.R. 208-209.

Under 8 U.S.C. 1326, it is a criminal offense for a previously removed alien to reenter the United States unless the alien obtains the express prior consent of the Attorney General to reapply for admission (or an exception to the consent requirement applies). 8 U.S.C. 1326(a). Subsection 1326(d), enacted after this Court's decision in United States v. Mendoza-Lopez, 481 U.S. 828 (1987),¹ allows defendants charged under Section 1326 to collaterally attack an underlying removal order under specified circumstances.

¹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 441, 110 Stat. 1279.

In particular, the alien must show that he "exhausted any administrative remedies that may have been available," that the "deportation proceedings at which the order was issued improperly deprived [him] of the opportunity for judicial review," and that "the entry of the order was fundamentally unfair." 8 U.S.C. 1326(d). "To establish fundamental unfairness, a defendant must show both that his due process rights were violated and that he suffered prejudice from the deportation proceedings." E.g., United States v. Arita-Campos, 607 F.3d 487, 493 (7th Cir. 2010).

Petitioner moved to dismiss the information by collaterally attacking his removal order under Section 1326(d). Pet. App. 4a; C.A. E.R. 175-189. He contended that the underlying 2011 removal order was fundamentally unfair on the ground that his 2010 drug convictions were not aggravated felonies, and that the IJ therefore erred in failing to advise him of his right to seek the Attorney General's permission for voluntary departure without entry of a formal removal order ("pre-conclusion voluntary departure"). C.A. E.R. 181-182; see 8 U.S.C. 1229c(a)(1) (permitting the Attorney General to allow such voluntary departure in certain cases not involving aggravated felonies under 8 U.S.C. 1227(a)(2)(A)(iii)). Without focusing on any particular substance, petitioner contended that the statutes of conviction, Cal. Health & Safety Code §§ 11378 and 11379 (Deering 2010), criminalize a broader range of controlled substances than the federal CSA, and are indivisible as to the

controlled-substance element. C.A. E.R. 182. Petitioner argued that the IJ thus erred in considering petitioner's prior convictions to be aggravated felonies, and that the error was prejudicial because without a prior aggravated-felony conviction, petitioner would not have been statutorily barred from applying for pre-conclusion voluntary departure. Id. at 177-178; 8 U.S.C. 1229c(a)(1). Moreover, petitioner argued, he would have had a "plausible claim" for that discretionary relief. C.A. E.R. 185-187 (emphasis omitted).²

The district court denied petitioner's motion. The government had agreed with petitioner that his conviction under Section 11379 did not qualify as an aggravated felony, and the court therefore focused on Section 11378. C.A. E.R. 77 n.2, 88. The court determined that, while that statute prohibits a "broader swath" of substances than the CSA, it is divisible as to its controlled-substance element, such that the relevant offense of conviction for analytical purposes can be narrowed to possession for sale of a particular controlled substance. Id. at 78-84 (citation omitted); see Pet. App. 5a. Because petitioner's conviction was for possession for sale of methamphetamine -- a

² Petitioner contended (C.A. E.R. 187) that he satisfied Section 1326(d)'s requirements that he exhaust administrative remedies and show a deprivation of the opportunity for judicial review, 8 U.S.C. 1326(d)(1)-(2), because the IJ failed to advise him that he was eligible to apply for discretionary relief.

controlled substance covered by both federal and California law -
- the court found that his conviction was an aggravated felony,
which made him statutorily ineligible for the voluntary-departure
relief he argued the IJ should have brought to his attention. C.A.
E.R. 84-85; see Pet. App. 5a.

b. The case proceeded to a bench trial at which petitioner
was convicted of unlawful reentry. Pet. App. 5a. Petitioner then
filed a motion to reconsider the denial of his motion to dismiss,
contending in relevant part that his 2010 methamphetamine
conviction under Section 11378 did not qualify as an aggravated
felony because California law classifies more substances as
"methamphetamine" than does federal law.³ Petitioner did not
dispute that California and federal law define "methamphetamine"
in nearly identical terms. C.A. E.R. 71; compare Cal. Health &
Safety Code § 11055(d)(2) (Deering 2010) ("Methamphetamines, its
salts, isomers, and salts of its isomers"), with 21 C.F.R.
1308.12(d)(2) ("Methamphetamine, its salts, isomers, and salts of
its isomers"). He argued, however, that Section 11378 is overbroad
because a federal regulation, 21 C.F.R. 1308.22 (2010), excepted
"from all [CSA] schedules" a particular over-the-counter
pharmaceutical product -- a decongestant inhaler manufactured by
Classic Pharmaceuticals LLC -- that contained a certain isomer of

³ As petitioner acknowledges (Pet. 6 & n.2), this argument
differed from the one he had made in his initial motion to dismiss.

methamphetamine, i.e., levmetamfetamine or "L-meth." Pet. App. 5a; C.A. E.R. 51, 71-74; see 21 U.S.C. 811(g) (directing the Attorney General to "exclude any non-narcotic drug which contains a controlled substance from [federal enforcement provisions] * * * if such drug may, under the Federal Food, Drug, and Cosmetic Act * * * be lawfully sold over the counter without a prescription").⁴

The district court denied petitioner's motion, relying on prior decisions of this Court to find that petitioner had not shown a "realistic probability" that California would apply its felony drug laws to possession of the excepted over-the-counter inhaler. D. Ct. Doc. 68, at 13-26 (May 13, 2014). The court sentenced petitioner to 30 months of imprisonment, to be followed by two years of supervised release. C.A. E.R. 2-3.

3. The court of appeals affirmed. Pet. App. 1a-12a. The court rejected petitioner's renewed contention that the 2011

⁴ The two primary isomers of methamphetamine are L-methamphetamine ("L-meth") and D-methamphetamine ("D-meth"); D-meth is the more psychoactive isomer traditionally associated with illicit drug use. See Gov't C.A. Br. 21-22; Pet. C.A. Br. 16. As an isomer of methamphetamine, however, L-meth is also a controlled substance. 21 C.F.R. 1308.12(d)(2). The exclusion in 21 C.F.R. 1308.22 (2010) applied only "to the finished drug product in the form of an inhaler (in the exact formulation detailed in the application for exclusion)." 75 Fed. Reg. 13,678, 13,679 (Mar. 23, 2010). "The extraction or removal of the active ingredient (Levmetamfetamine) from the inhaler shall negate this exclusion and, depending on the circumstances, result in the possession or manufacture of a schedule II controlled substance." Id. at 13,679.

removal order was "fundamentally unfair" on the theory that his 2010 methamphetamine conviction was not an aggravated felony. Id. at 6a-11a (citation omitted). The court first determined that Section 11378 is divisible as to the controlled-substance element. Id. at 8a-10a. Next, the court rejected petitioner's claim that the federal regulation excluding the over-the-counter inhaler, 21 C.F.R. 1308.22 (2010), rendered Section 11378 overbroad. Pet. App. 10a-11a. The court found that Section 11378 "is not 'overbroad on its face'" and "'does not expressly include conduct not covered by the generic offense.'" Ibid. (quoting United States v. Burgos-Ortega, 777 F.3d 1047, 1055 (9th Cir.), cert. denied, 135 S. Ct. 2848 (2015)). "[R]ather," the court explained, Section 11378 "is silent as to the existence of a parallel [L-meth] exception.'" Ibid. (quoting Burgos-Ortega, 777 F.3d at 1055) (second set of brackets in original). Because the statute was not facially overbroad, and petitioner had not identified any case in which a defendant was prosecuted under Section 11378 in connection with the excluded over-the-counter inhaler, petitioner's "overbreadth arguments [were] unavailing." Ibid.

4. Petitioner was released from federal prison on September 2, 2016. See Federal Bureau of Prisons, U.S. Dep't of Justice, Find an inmate, <https://www.bop.gov/inmateloc/> (record for register 37937-298). According to U.S. Immigration and Customs Enforcement, petitioner was removed to Mexico four days later.

ARGUMENT

Petitioner renews his contention (Pet. 29-36) that his 2011 removal order was “fundamentally unfair” for purposes of 8 U.S.C. 1326(d) because his 2010 California conviction for possessing methamphetamine for sale under Cal. Health & Safety Code § 11378 (Deering 2010) does not qualify as an “aggravated felony.” In particular, petitioner argues that Section 11378 is facially overbroad and thus necessarily demonstrates “a realistic probability” that the State “would apply its statute to conduct that falls outside” the federal CSA. Pet. 31 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)). Petitioner further argues (Pet. 9-23) that the courts of appeals are divided regarding proper application of the realistic-probability standard to facially overbroad statutes.

The decision of the court of appeals does not implicate the question petitioner raises or the circuit conflict he asserts. The court determined that Section 11378 is not facially overbroad because it does not expressly include controlled substances not covered by the CSA. Thus, the realistic-probability standard’s application to facially overbroad statutes is not at issue in this case. In any event, this case is not a suitable vehicle for resolving any division among the courts of appeals because petitioner cannot show prejudice and has a limited stake in the resolution of the question he raises. This Court recently denied

several petitions for writs of certiorari raising similar questions,⁵ and the same result is warranted here.

1. a. As a general matter, to determine whether a state conviction qualifies as “illicit trafficking in a controlled substance,” and thus constitutes an “aggravated felony” under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., courts employ a “categorical approach” under which they compare the definition of the state offense to the generic federal definition. See, e.g., Moncrieffe v. Holder, 569 U.S. 184, 190–192 (2013). As relevant here, “to satisfy the categorical approach, a state drug offense must * * * ‘necessarily’ proscribe conduct that is an offense under the CSA.” Id. at 192. If the definition of the state offense is broader than the relevant federal definition, the prior state conviction does not qualify as an “aggravated felony” for purposes of the INA. Ibid.; see also, e.g., Mathis v. United States, 136 S. Ct. 2243, 2248 (2016) (applying categorical approach in the context of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)).

⁵ See Rodriguez Vasquez v. Sessions, No. 17-1304 (June 25, 2018); Vail-Bailon v. United States, No. 17-7151 (June 11, 2018); Robinson v. United States, No. 17-7188 (June 11, 2018); Green v. United States, No. 17-7299 (June 11, 2018); Gathers v. United States, No. 17-7694 (June 11, 2018); Espinoza-Bazaldua v. United States, No. 17-7490 (June 11, 2018); Fletcher v. United States, 138 S. Ct. 979 (2018) (No. 17-6434); Castillo-Rivera v. United States, 138 S. Ct. 501 (2017) (No. 17-5054).

This Court has cautioned, however, that the categorical approach “is not an invitation to apply ‘legal imagination’ to the state offense.” Moncrieffe, 569 U.S. at 191 (quoting Duenas-Alvarez, 549 U.S. at 193). Instead, it requires “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside” the federal definition. Duenas-Alvarez, 549 U.S. at 193; see Taylor v. United States, 495 U.S. 575, 602 (1990) (explaining that the categorical approach is satisfied if the “statutory definition [of the prior conviction] substantially corresponds to [the] ‘generic’ [definition].”).

b. Petitioner contends (Pet. 29-36) that the court of appeals erred in applying Duenas-Alvarez’s reasonable-probability test to Section 11378. On petitioner’s view, the reasonable-probability test does not apply where a statute “facially cover[s] both generic and non-generic conduct.” Pet. 30-31. In that situation, petitioner states, “the statute’s language itself create[s] the realistic probability that the State will punish crimes that do not qualify under federal law.” Pet. 31 (brackets, citation, ellipsis and quotation marks omitted).

The court of appeals’ decision does not conflict with the principle petitioner posits. The court determined that Section 11378 “is not ‘overbroad on its face’” because it “‘does not expressly include conduct not covered by the generic offense.’”

Pet. App. 10a-11a (quoting United States v. Burgos-Ortega, 777 F.3d 1047, 1055 (9th Cir.), cert. denied, 135 S. Ct. 2848 (2015) (emphasis added). “[R]ather,” the court explained, Section 11378 “‘is silent as to the existence’” of an L-meth exception that would parallel the exception provided by federal law. Ibid. (quoting Burgos-Ortega, 777 F.3d at 1055). Petitioner is thus incorrect in describing (Pet. 22) the court’s opinion as having rejected his argument on the ground that “[p]etitioner could not prove,” despite a facially overbroad statute, that “the State actually ‘prosecuted’ defendants for the non-generic conduct.” See Pet. 26 (similar). Instead, the court rejected petitioner’s argument because it determined that the California statute was not overbroad, and no state prosecution suggested that the State applied it to non-generic conduct. Pet. App. 10a-11a.

c. Contrary to petitioner’s contention (Pet. 29-36), the court of appeals’ conclusion that Section 11378 is not facially overbroad is consistent with this Court’s cases. Petitioner contends (e.g., Pet. 31) that Section 11378 is overbroad because it does not expressly exempt an over-the-counter inhaler containing L-meth, which is exempted from the CSA by federal regulation, 21 C.F.R. 1308.22 (2010). This Court rejected a similar argument in Moncrieffe, supra. There, the Court found unpersuasive the government’s “fears that a conviction under any state firearms law that lacks * * * an exception” for antique

firearms parallel to an exception in federal law, 18 U.S.C. 921(a)(3), "will be deemed to fail the categorical inquiry." 569 U.S. at 205. Under Duenas-Alvarez, the Court explained, an alien could not "defeat the categorical comparison" between state and federal law by pointing to a state statute's silence with respect to the antique firearms exempted by federal law. Id. at 206. Rather, the "noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." Ibid. Similarly, here, the court of appeals held that petitioner could not demonstrate that Section 11378 is overbroad simply by pointing to its silence with respect to an inhaler exempted by federal regulation. Pet. App. 10a-11a. Petitioner, moreover, fails to explain how preemption principles would permit California to criminalize the sale of an inhaler that is expressly authorized by federal law.

2. Petitioner errs in arguing (Pet. 9-23) that the decision below implicates a division in the courts of appeals over the application of Duenas-Alvarez's "realistic probability" test.

Petitioner asserts (Pet. 16-19) that, in the view of the Fifth and Eighth Circuits and the Board of Immigration Appeals (BIA), a defendant establishes the requisite probability only by demonstrating that the State actually prosecutes the nonqualifying conduct under the relevant statute. Petitioner further asserts (Pet. 9-16) that the First, Third, Fourth, Sixth, Tenth, and

Eleventh Circuits take the position that the "realistic probability" test is satisfied if a state statute on its face defines an offense more broadly than the federal crime. And petitioner characterizes (Pet. 20-22) the Ninth Circuit's precedent as "tak[ing] inconsistent positions" on the issue.

To the extent any such division exists, it is not at issue in this case. As discussed above, the court of appeals here determined that Section 11378 "is not 'overbroad on its face.'" Pet. App. 10a-11a (quoting Burgos-Ortega, 777 F.3d at 1055). The court thus had no occasion to consider whether a defendant convicted under a facially overbroad statute must demonstrate that the State actually prosecutes the nonqualifying conduct under the relevant provision. Petitioner is therefore incorrect in asserting (Pet. 2) that the court below "embraced" the view that "whether a state actually prosecutes individuals for non-generic conduct" is "dispositive" even when a statute is facially overbroad.

Indeed, petitioner acknowledges (Pet. 20) that in United States v. Grisel, 488 F.3d 844, cert. denied, 552 U.S. 970 (2007), the Ninth Circuit, sitting en banc, stated that "[w]here * * * a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of

the crime.” Id. at 850 (quoting Duenas-Alvarez, 549 U.S. at 193).⁶ The panel decision in this case did not purport to, and in any event could not, overturn that precedent. See Pet. App. 10a.

Petitioner nonetheless asserts (Pet. 21) that “other Ninth Circuit panels” have rejected Grisel’s view of Duenas-Alvarez and adopted an “actual-prosecution” requirement for facially overbroad statutes. For the reasons discussed above, however, any such intra-circuit conflict would not be implicated in petitioner’s case, in which the court of appeals found that the state statute was not facially overbroad. Moreover, intra-circuit conflicts do not warrant this Court’s review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). And petitioner’s claim of an intra-circuit conflict is in any event incorrect. The Ninth Circuit cases on which petitioner relies involved statutes that were silent as to a particular exception. Consistent with its decision here, the court of appeals considered those statutes not to be facially overbroad, and determined whether they reached

⁶ See also, e.g., United States v. Vidal, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (“Vidal has * * * satisfied his burden by pointing to the text of [the statute,] which * * * expressly extends to accessories after the fact.”), abrogated in part on other grounds by United States v. Snellenberger, 548 F.3d 699 (9th Cir.2008) (en banc) (per curiam), cert. denied, 558 U.S. 116 (2010); Chavez-Solis v. Lynch, 803 F.3d 1004, 1009 (9th Cir. 2015) (“[W]hen a ‘state statute’s greater breadth is evident from its text,’ a petitioner need not point to an actual case applying the statute of conviction in a nongeneric manner.”) (quoting Grisel, 488 F.3d at 850).

nonqualifying conduct by looking to actual prosecutions. See Burgos-Ortega, 777 F.3d at 1055 (distinguishing Grisel on the ground that the statute at issue in Burgos-Ortega did “not expressly include conduct not covered by the generic offense, but rather is silent as to the existence of a parallel * * * exception”); see also Holder v. Medina-Lara, 771 F.3d 1106, 1115-1117 (9th Cir. 2014) (finding California firearms statute that lacks express exemption for antique firearms present in federal statute is overbroad because “California obviously prosecutes individuals for firearm crimes arising under [the relevant statute] even when the firearm in question is antique.”); United States v. Hernandez, 769 F.3d 1059, 1062-1063 (9th Cir. 2014) (per curiam) (same for California felon in possession statute).

3. In addition, this case would be a poor vehicle for considering the question presented. Irrespective of further review of that question, Petitioner is unlikely to be able to demonstrate the prejudice required to succeed on his collateral challenge to his underlying order of removal. And even if he were able to make that showing, petitioner’s practical interest in the case is limited.

a. To succeed in collaterally attacking his 2011 removal order -- and thus to invalidate his conviction under Section 1326 -- petitioner must establish both that he was eligible for voluntary departure in 2011 because he did not have a prior

conviction for an aggravated felony and that he suffered prejudice from the IJ's failure to inform him of his ability to apply for such discretionary relief. E.g., United States v. Ubaldo-Figueroa, 364 F.3d 1042, 1050 (9th Cir. 2004). To demonstrate prejudice, petitioner must "show[] that it is plausible, rather than merely conceivable or possible, that an IJ would have granted the relief for which he was apparently eligible." United States v. Valdez-Novoa, 780 F.3d 906, 914 (9th Cir.), cert. denied, 135 S. Ct. 2913 (2015); see ibid. ("We expressly reject the contention that relief is 'plausible' whenever an IJ could have granted the relief at issue without abusing his discretion."); id. at 917 ("We reaffirm that the burden to show prejudice rests with the defendant."). Petitioner is unlikely to have been able to make that showing.⁷

In determining whether to grant pre-conclusion voluntary departure, an immigration judge must consider factors both favorable and unfavorable to the alien. See Campos-Granillo v. INS, 12 F.3d 849, 852-853 & n.8 (9th Cir. 1993); In re Arguelles-Campos, 22 I. & N. Dec. 811, 817 (B.I.A. 1999). Although petitioner pointed in the district court to equities in his family life and work history, petitioner also has a "history of substance

⁷ Although the government raised this issue in the district court, see C.A. E.R. 131-134, the court did not address it, and the government did not renew the prejudice argument on appeal.

abuse” and “a series of convictions for drug offenses.” Pet. C.A. Br. 3; see Campos-Granillo, 12 F.3d at 852 n.8 (listing “the existence, seriousness, and recency of any criminal record” among the unfavorable factors meriting consideration). Indeed, as of 2011, petitioner’s criminal record included, in addition to the two 2010 drug-trafficking convictions involving methamphetamine that provided the basis for his removal order, five additional felony convictions for drug possession from 2009 and 2010, as well as multiple convictions for providing false identification to law enforcement. PSR ¶¶ 25, 28, 33, 36, 38. Petitioner’s significant criminal record renders implausible any assertion that he might have received discretionary relief in 2011, and thus that he suffered the prejudice necessary to collaterally attack his conviction. See, e.g., United States v. Alcon-Mateo, 538 Fed. Appx. 776, 777-778 (9th Cir. 2013) (no prejudice where prior convictions “for driving under the influence” and domestic violence prevented alien from having “a plausible case” for voluntary departure, “despite favorable factors”), cert. denied, 134 S. Ct. 1803 (2014).⁸

⁸ See also, e.g., In re Posadas-Posadas, File No. A094-989-162, 2012 WL 371659 (B.I.A. Jan. 18, 2012) (affirming denial of voluntary departure where the alien was arrested twice for driving on a suspended license and had one DUI, despite the alien’s family ties and lengthy stay in the United States); In re Serna, 20 I. & N. Dec. 579, 580, 586 (B.I.A. 1992) (upholding denial of voluntary departure where the alien had a single conviction for the possession of an altered immigration document, had been

b. Moreover, even if petitioner could succeed on his collateral attack, invalidating his conviction under Section 1326 would have limited practical significance. Although convictions ordinarily have "collateral consequences adequate to meet Article III's injury-in-fact requirement," Spencer v. Kemna, 523 U.S. 1, 14 (1998), any collateral consequences in petitioner's case are attenuated. Petitioner has completed his prison sentence and has been removed from the United States. His two-year term of supervised release will also have expired before this case could be heard on the merits. And he has not asserted that he would be legally entitled to, or is likely to, reenter the United States at any point in the foreseeable future.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Acting Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FRANCESCO VALENTINI
Attorney

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residing in the United States for seven years, and intended to marry a United States citizen with whom he had a citizen child).